(13)

No. 93-908

In The

Supreme Court of the United States

October Term, 1993

CHARLES J. REICH,

Petitioner,

v.

MARCUS E. COLLINS and
THE GEORGIA DEPARTMENT OF REVENUE,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Georgia

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF JAMES B. BEAM DISTILLING CO. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF JAMES B. BEAM DISTILLING CO. IN SUPPORT OF PETITIONER

James B. Beam Distilling Co. ("Beam") hereby respectfully moves for leave to file the attached brief *amicus curiae* in the above-styled case (the *"Reich"* case) in support of the Petitioner and for reversal of the decision of the Georgia Supreme Court. Counsel for the Petitioner has consented to the filing of this brief. Beam requested the consent of Counsel for Respondents, but Counsel for the Respondents refused.

Beam's interest in the *Reich* case arises from the fact that Beam is itself currently, and for the second time in the same case, a petitioner in this Court for a Writ of Certiorari to the Supreme Court of Georgia (Case No. 93-1140) (the *"Beam"* case). A decision on Beam's petition has been deferred by the Court. Among several possibilities, the Court may be holding Beam's case in anticipation of the Court's decision in *Reich*. The Georgia Supreme Court issued its latest opinions in both *Reich* and *Beam* on the same day, based its latest decisions in the two cases in large part on the same grounds, relied in *Reich* on its holdings in *Beam*, and cross-referenced each case, one with the other. The cases are as a practical and jurisprudential matter intertwined, companion cases, and Beam will likely be directly affected by the Court's ruling in *Reich*. Both cases are ultimately about the intentional manipulation and misrepresentation of taxpayer remedies by the same Respondents so as to deprive both petitioners of their Federal constitutional rights.[1]

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[1] The Respondents in *Reich* are Marcus E. Collins, who is the Georgia State Revenue Commissioner, and the Georgia Department of Revenue. The

In short, the facts and circumstances of the case of Charles J. Reich (hereinafter "Reich" or along with other similarly situated federal retirees sometimes referred to as the "Federal Retirees") cannot be fully understood or addressed without understanding the interplay of Reich's case with the long history of manipulation and misrepresentation of the same legal remedies by the same Respondents in Beam's case. The additional facts, circumstances, and law of Beam's case – matters which, though directly relevant, will not be fully addressed in the briefs of the *Reich* parties – will serve to inform the Court about the full set of circumstances leading up to the Georgia court's decision in *Reich*.

Simply put, after remand from this Court in 1991, Respondents sought to eliminate the remedy that they had previously told the Federal Retirees and Beam to use. The Respondents were successful, and the Georgia Supreme Court retroactively eliminated the remedy that the same court had previously held to be the appropriate remedy. Thus, Reich and Beam followed years of direction from the Respondents and the Georgia courts and used the statutory refund remedy everyone had recognized only to have the Respondents and the Georgia Supreme Court later say, after it was too late to follow any other course, that the statutory refund remedy did

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Respondents in *Beam* are the State of Georgia; Joe Frank Harris, individually (former Georgia Governor); Zell Miller, individually and as Governor of the State of Georgia; Marcus E. Collins, individually and as Georgia State Revenue Commissioner; and Claude L. Vickers, individually and as Director of the Fiscal Division of the Department of Administrative Services. All these respondents are represented by attorneys in the Georgia Department of Law in both cases.

not apply to their claims after all.[2] To allow such a course of action to continue or to stand would be to undermine the confidence of law-abiding, taxpaying citizens that the United States Constitution stands as a barrier to the unjust, permanent taking of their property by the states.

The attached brief will highlight additional facts and circumstances showing the length to which the Respondents will go to protect the State fisc, even to the point of directly contravening the clear, unanimous Federal constitutional law as articulated by this Court. Respondents argued and the lower court in *Beam* held that, even if the Refund Statute applied to Beam's situation, Beam would not have standing to receive a refund of the taxes collected in violation of the Commerce Clause because Beam had indicated on invoices to its customers the amount of the tax everyone admits Beam paid.[3] Though this

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[2] The Respondents argued and the Georgia Supreme Court has now held 1) that Georgia's tax refund statute for redress of illegally collected taxes (O.C.G.A. § 48-2-35, the "Refund Statute," Beam's Petition for Writ of Certiorari in Case No. 93-1140 (filed Jan. 13, 1994) at Appendix MM ("Beam's Cert. Pet. App.")) does not apply to taxes collected in contravention of the Constitution of the United States; and 2) that the elimination of the postdeprivation, statutory remedy found in the Refund Statute and relied on by Reich and Beam was not a violation of Reich's and Beam's Federal due process rights because Reich and Beam had available to them adequate predeprivation remedies. *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992) ("*Reich* (Ga. I)") (Beam's Cert. Pet. App. L), *vacated and remanded*, 509 U.S. –, 113 S. Ct. 3028 (1993) (Beam's Cert. Pet. App. D), *on remand*, 263 Ga. 602, 437 S.E.2d 320 (Dec. 2, 1993) ("*Reich* (Ga. II)") (Beam's Cert. Pet. App. K), *cert. granted*, 114 S. Ct. 1048 (Feb. 22, 1994); *James B. Beam Distilling Co. v. State*, 263 Ga. 609, 437 S.E.2d 782 (Dec. 2, 1993) ("*Beam* (Ga. II)") (Beam's Cert. Pet. App. A), *cert. petition pending*, U.S. S. Ct. Case No. 93-1140.

[3] As a condition to selling alcoholic beverages to its customers in Georgia, Beam, during the time period relevant to its case, was compelled under the then current versions of the alcohol tax statute at issue (O.C.G.A. § 3-4-60, the "Pre-1985 Alcohol Tax Statute," Beam's Cert. Pet. App. EE) to prepay the applicable Georgia alcohol taxes by purchasing stamps in proper

Commerce Clause/"pass-on" issue was not at issue in *Reich*, the Georgia court's use of this issue sheds light upon, among other things, what relief should be granted in the *Reich* case. Apart from being factually, legally, and economically flawed, the lower court holding with respect to "pass-on" and standing (sometimes referred to herein as the "pass-on/standing" defense, bar, argument, or issue) provide another example of the extent to which the Respondents and the Georgia courts are willing to ignore Federal law in order to retain a taxpayer's unconstitutionally collected property. The lower court's repeated refusal to follow Federal constitutional law on

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denominations denoting the prior payment of taxes and affixing these stamps to each and every bottle or container of alcoholic beverages prior to its shipment across Georgia's state lines. *See infra* Brief note 26. Several years ago it was decided in the *Beam* case that the Pre-1985 Alcohol Tax Statute unconstitutionally imposed a tax upon imported alcoholic beverages at twice the rate imposed upon the same beverages produced in Georgia from Georgia-grown products. Having paid the higher taxes, as Respondents admit Beam did, *see infra* Brief note 37, Beam (like all local and out-of-state alcohol producers) invoiced the amount of the tax to Beam's wholesalers, thereby increasing the shelf price of Beam's products. The effect was that the shelf price of Beam's products was higher because of the tax than the shelf price of Beam's local Georgia competitors. Thus, in the words of this Court in a practically identical case involving a discriminatory alcohol tax violative of the Commerce Clause, the

> *tax injured petitioner not only because* it left petitioner poorer in an absolute sense than before (a problem that might be rectified to the extent petitioner passed on the economic incidence of the tax to others), but also because *it placed petitioner at a relative disadvantage in the marketplace vis-à-vis competitors* distributing preferred local products.

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dep't of Business Regulation of Florida, 496 U.S. 18, 110 S. Ct. 2238, 2256 (1990) (emphasis supplied) ("*McKesson*"). Hence, "[E]ven if the tax [was] completely and successfully passed on, it increase[d] the price of [Beam's] products as compared to the exempted beverages." *Id.*, 110 S. Ct. at 2256 (quoting *Bacchus Imports v. Dias*, 468 U.S. 263, 267, 104 S. Ct. 3049, 3053 (1984)).

these points strongly supports the grant of specific relief to *Reich*.

Moreover, because of this superficial distinction between *Beam* and *Reich* on the basis of the pass-on/standing issue, a simple vacation and remand of the lower court's decision in *Beam* would afford Respondents an additional opportunity for more of the same kind of manipulation at the remedial level unless this Court addresses the problem. The attached brief will, therefore, respectfully suggest how the Court might finally resolve these controversies between taxpayers and the Respondents and conserve judicial resources while protecting the property and due process rights of taxpayers, the supremacy of the Federal Constitution, this Court's decisions, and the rule of law. Namely, this Court should render judgments for the taxpayers in *Reich* and *Beam* in the amount of the unconstitutionally collected taxes, plus interest.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*

Beam has stated its interest in the *Reich* case in the foregoing motion, and respectfully refers the Court to that discussion. In short, the within *amicus* has suffered and is under threat of suffering the same due process deprivation with respect to Georgia taxes.

SUMMARY OF ARGUMENT

If this Court does not specifically order a refund in *Reich* and *Beam*, Respondents will, in the *Beam* case, have an additional opportunity to continue their manipulation of remedies against Georgia taxpayers with Federal constitutional claims after any remand from this Court. Respondents' pass-on/standing argument asserted against Beam is completely untenable under *McKesson*. This Court should reverse the lower court opinions in *Reich* and *Beam* and grant these taxpayers a refund of the unconstitutionally collected taxes.

After having lost on the merits of Reich's and Beam's constitutional claims, Respondents eliminated the remedy that Respondents had previously and affirmatively represented as the correct remedy for Reich and Beam. Reich and Beam followed the advice and direction of the Respondents and the Georgia courts and used the Refund Statute only to have Respondents and the Georgia Supreme Court later to say that it was too late to follow any other course and that the Refund Statute did not apply to Reich and Beam after all. All legislative, judicial, and official statements and conduct on the part of Respondents and the Georgia courts had previously directed taxpayers to use the Refund Statute. Federal due process prohibits such *post hoc* manipulation of remedies

and estops Respondents from arguing that Reich and Beam should have pursued some other course. At this point, the only option consistent with Federal due process is for Respondents to refund to Reich and Beam the unconstitutionally collected taxes. None of the administrative, equitable, or declaratory remedies cited by the Georgia court pass constitutional muster as clear and certain, duress-free predeprivation remedies that Reich or Beam could have pursued.

ARGUMENT

I. THE ABSENCE OF A SPECIFIC ORDER OF A REFUND WILL AFFORD RESPONDENTS AN ADDITIONAL OPPORTUNITY FOR MANIPULATION OF REMEDIES ON ANY FUTURE REMAND FROM THIS COURT.

Having first held in its decision in *Reich* (Ga. I), 422 S.E.2d at 846, that the Refund Statute never applied to the situation of unconstitutionally collected taxes after all, the Georgia Supreme Court then held in *Beam* (Ga. II), 437 S.E.2d at 782, that Respondents had established a pass-on/standing defense to Beam's claim under that same (putatively resurrected) Refund Statute.[1] In doing so, the

[1] In *Beam* (Ga. II), the Georgia Supreme Court, despite its holdings to the contrary in *Reich* (Ga. I and II) and without explanation, "assum[ed] that [the Refund Statute] *may be* an appropriate means by which one may seek a refund of taxes paid pursuant to a statute subsequently declared unconstitutional." 437 S.E.2d at 784 n.3 (emphasis supplied). The following cite was offered as the sole support for this equivocation: "See *State of Georgia v. Private Truck Council* [ ], 258 Ga. 531 (371 SE2d 378) (1988) [confirming the availability of the Refund Statute for constitutional claims]. But see *Reich v. Collins*, 262 Ga. 625 (422 SE2d 826) (1992) [retracting the availability of the Refund Statute for constitutional claims]." *Id.*

Georgia court conspicuously ignored this Court's unanimous rejection of the very same pass-on/standing defense to a claim of unconstitutional tax discrimination as a matter of Federal law. *See McKesson*, 110 S. Ct. 2255-56.[2]

In other words, the very event held by this Court (the so-called "pass-on") to inflict the unconstitutional Commerce Clause injury upon a taxpayer in Beam's position (by disadvantaging the taxpayer's products vis-á-vis local, preferred competitors, *see McKesson*, 110 S. Ct. at

[2] Respondents' attempt to portray the pass-on/standing issue as an adequate and independent state law basis on which to deny Beam relief is completely illegitimate, for the Georgia court's denial of a refund based on pass-on/standing is neither "independent" of controlling Federal Commerce Clause and due process jurisprudence nor "adequate" since this Court has already rejected the pass-on/standing defense in this identical context of Commerce Clause discrimination. *See id.*; *see also Harper v. Virginia Dep't of Taxation*, 590 U.S. ___, 113 S. Ct. 2510, 2519 (1993) (no "independent and adequate ground that [state's] law of remedies offered no 'retrospective refund remedy' "); *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 106 S. Ct. 1904, 1911 (1986) (Federal law question integral to state court's disposition); *Straub v. Baxley*, 355 U.S. 313, 78 S. Ct. 277, 281 (1958) (non-federal ground of lack of standing not adequate because such ground was contrary to Federal law); *West Chicago Street R.R. Co. v. Illinois*, 201 U.S. 506, 26 S. Ct. 518, 521 (1906) (Federal questions permeated whole case).

The Refund Statute provides that a "*taxpayer* shall be refunded" O.C.G.A. § 48-2-35(a) (emphasis supplied). The term " 'Taxpayer' means any person *made liable by law* to file a return or *to pay taxes*." O.C.G.A. §§ 48-1-25 (Beam's Cert. Pet. App. LL); 3-1-2(21) (App. R). Under Georgia law, "[o]nly the party who actually paid the taxes," *Blackmon v. Premium Oil Stations, Inc.*, 129 Ga. App. 169, 198 S.E.2d 900, 902 (1973), is accorded standing to assert a refund. In relying upon cases involving sales taxes in Georgia for the denial of standing to Beam, *see, e.g., Eimco BSP Serv. Co. v. Chilivis*, 241 Ga. 263, 244 S.E.2d 829 (1978); *Atlanta Am. Motor Hotel Corp. v. Undercofler*, 222 Ga. 295, 149 S.E.2d 691 (1966); *Blackmon v. Georgia Independent Oilmen's Ass'n*, 129 Ga. App. 171, 198 S.E.2d 896 (1973); and *Blackmon v. Premium Oil Stations, Inc.*, 129 Ga. App. 169, 198 S.E.2d 900 (1973), the Georgia court ignored the controlling authority of this Court that it is the *discrimination* between local and out-of-state products that occasions the Commerce Clause violation. *See McKesson*, 110 S. Ct. at 2256.

2256) was used by the Georgia court to deny Beam a refund. As this Court has explained clearly and at length in *McKesson*, the fact that the higher tax is included in the cost of the disadvantaged taxpayer's product is the proof that the disfavored taxpayer suffers competitive injury under the Commerce Clause when compared to preferred local taxpayers.[3] The Georgia court's contrary reasoning constitutes a clear refusal to follow this Court's holding in *McKesson*, and Beam should not be denied standing on that basis.

Respondents' abandonment of the Refund Statute in *Reich* and concurrent use of it against Beam should not rescue Respondents from their obligation to refund unconstitutionally collected taxes. The Georgia Supreme Court has now held in *Reich* that the Refund Statute cannot apply to Reich's or Beam's case. Regardless of whatever defenses may have been available under the Refund Statute, Federal due process (not the Georgia Refund Statute) at a minimum entitles Reich and Beam to meaningful, backward-looking relief to rectify retroactively the unconstitutional deprivation, *i.e.* a refund.[4] The conclusion is as inescapable as it is fair and correct: To satisfy Federal due process, Georgia must retroactively

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[3] *See id.* at 2255-57. "To whatever extent petitioner succeeded in passing on the economic incidence of the tax through higher prices to its customers, it most likely lost sales to the favored distributors or else incurred other costs (*e.g.*, for advertising) in an effort to maintain its market share." *Id.* at 2256.

[4] *See id.* at 2247 & 2258. Indeed, Beam's claim is predicated directly upon the Due Process, Equal Protection, and Supremacy Clauses of the United States Constitution, and, under those provisions and at a minimum, Beam is entitled to meaningful backward-looking relief. *See id.*; Beam's Second Amendment to Complaint, R. (*Beam* (Ga. II), No. S93A1217) at 1157-58, ¶¶ 71-73 (Beam's Cert. Pet. App. O); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971).

achieve nondiscrimination among its taxpayers; with no other options left, Respondents must refund the unconstitutionally collected taxes.[5]

Despite *McKesson*'s firm rejection of the pass-on/standing defense to justify Commerce Clause discrimination, Respondents (throughout their brief in opposition to Beam's Petition for Writ of Certiorari ("Respondents' *Beam* Cert. Op. Brief")) have suggested repeatedly that their assertion of a purported pass-on/standing defense distinguishes Beam's case from Reich's case. As shown above, it does not. But, if this Court were to reverse the Georgia court's decision in *Reich* (Ga. II) by granting Reich relief, and then to vacate or reverse and remand *Beam* in light of *Reich* without also stating exactly the form of relief to which Reich and Beam are entitled, Respondents and the Georgia courts will no doubt use the groundless pass-on/standing argument to deny Beam relief in yet some future round of this long, unfair ordeal.[6] The history of these cases further makes it clear

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[5] As for equitable considerations argued by Respondents, once a constitutional violation is established, due process, not equity, determines the scope of the relief. *See American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 110 S. Ct. 2323, 2334 (1990). And, no matter what factors a court may consider at the remedial level, the minimum Federal due process standards articulated in *McKesson* must be met when all is done. *See McKesson*, 110 S. Ct. at 2258 ("The State is free to choose which form of relief it will provide, *so long as* that relief satisfies the minimum federal requirements we have outlined.") (emphasis supplied). Reich and Beam want no more (but no less) than the Federal minimum relief described in *McKesson*.

[6] Beam began litigation against Respondents nearly a decade ago in 1985. This Court reversed and remanded *Beam* for implementation of an appropriate remedy in 1991. On remand, the Georgia Supreme Court remanded the case to the trial court and then, later on a second appeal from the trial court, denied Beam any relief along with Reich on December 2, 1993. Beam has returned to this Court for the second time now, and this Court will likely announce its decision in *Reich* in 1995 since Respondents

that even the appearance of any discretion with respect to remedy on remand will be used by the Respondents and the Georgia courts to deny Reich's and Beam's Federal constitutional rights. *See infra* note 20.

Beam respectfully submits that this Court should reverse the lower court opinions in *Reich* and *Beam* and grant these taxpayers a refund of the unconstitutionally collected taxes. If the Court grants such relief in *Reich*, the Court should grant certiorari in *Beam*, reverse the lower court, and then (rather than merely remanding in light of *Reich*) summarily grant judgment to Beam in the amount of the unconstitutionally collected taxes in a per curium opinion.[7] If the Court grants relief in *Reich*, nothing remaining in *Beam* will distinguish *Beam* from this Court's unanimous *McKesson* decision. The Court need not take briefing and hear argument on what it has already unanimously decided in *McKesson*.[8] In fact, a refund was

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refused the Court's invitation for expedited treatment of *Reich*. Thus, lest Beam endure yet another three or four year futile trip through the Georgia courts and back to this Court, it is imperative that, in its disposition of *Reich* and *Beam*, this Court make its judgment and mandate to Respondents clear: The taxpayers in *Reich* and *Beam* shall be refunded the unconstitutionally collected taxes because this is the only available remedy that comports with minimum standards of Federal due process articulated by this Court.

[7] *See Von Cleef v. New Jersey*, 395 U.S. 814, 89 S. Ct. 2051 (1969); *Keney v. New York*, 388 U.S. 440, 87 S. Ct. 2091 (1967); *Allison v. United States*, 386 U.S. 13, 87 S. Ct. 874 (1967) (case remanded with instructions); *see also General Atomic Co. v. Felter*, 436 U.S. 493, 98 S. Ct. 1939, 1941 (1978) ("[A] litigant who . . . has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court."); *Connor v. Coleman*, 425 U.S. 675, 96 S. Ct. 1814, 1814 (1976) ("Ten years of litigation have not yet resulted in a constitutionally apportioned Mississippi Legislature.").

[8] Although *McKesson* sets forth a range of remedial choices for states in the position Respondents were in three years ago, *see* 110 S. Ct. at 2252,

ordered by this Court in the *Ward* case.[9] If the Court orders a refund, *Ward*, *Reich*, and *Beam*, therefore, will represent an application of *McKesson* principles in the unique situation where a state has refused to follow the minimum standards of Federal due process.

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the Georgia Respondents and courts have already had ample opportunity to choose from among *McKesson*'s options, but have refused to do so, have forfeited their chance to make a selection, and have forced this Court to make a choice for them. This Court is not in a position to assess and collect taxes from the favored taxpayers, itself a constitutionally problematical matter at best. *See McKesson*, 110 S. Ct. at 2252 & n.23. The situation faced by the Court is similar to that faced by a court in reviewing the decision of another decisionmaker vested with controlled discretion. When the other decisionmaker has refused to choose among the options legally available to it or has chosen incorrectly, the court of review may make the choice for the decisionmaker. *See, e.g., Varney v. Secretary of Health and Human Services*, 859 F.2d 1396, 1401 (11th Cir. 1988); *Winans v. Bowen*, 853 F.2d 643, 647 (1987) (reversing and remanding for award of benefits); *Johnson v. Bowen*, 817 F.2d 983, 986 (2d Cir. 1987) ("[W]here application of the correct legal principles to the record could lead to only one conclusion, there is no need to require agency reconsideration."); *Benten v. Kessler*, 799 F. Supp. 281, 291 (E.D.N.Y. 1992); *Welchance v. Bowen*, 731 F. Supp. 806, 810 (M.D. Tenn. 1989).

[9] *Ward v. Board of County Comm'rs*, 253 U.S. 17, 40 S. Ct. 419 (1920), is closely analogous to *Reich* and *Beam*. This Court in *Ward* held that the collection of illegal taxes by a state imposes on the state an obligation to pay the money back as a matter of Federal due process:

> It is a well-settled rule that "money got through imposition may be recovered back"; and, as this court has said on several occasions, "the obligation to due justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." . . . To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the state.

Id. at 422 (citations omitted).

II. IN RESPONSE TO THIS COURT'S DECISIONS IN FAVOR OF TAXPAYERS, RESPONDENTS HAVE ELIMINATED THE SINGLE REMEDY THAT RESPONDENTS PREVIOUSLY AND AFFIRMATIVELY REPRESENTED AS THE CORRECT REMEDY.

When laid out in unadulterated fashion, the facts of the *Reich* and *Beam* cases speak for themselves and demonstrate why the latest decisions of the Georgia Supreme Court should not be allowed to stand. The facts of the *Reich* case have been well-stated by Reich in his Brief in the above-styled case. The intertwining facts of the *Beam* case lead to the same conclusion.

A. In spite of this Court's Commerce Clause Jurisprudence, the Respondents Have Retained the Essential Purpose and Effect of their Discriminatory Alcohol Tax Scheme.

The history of the *Beam* dispute goes back at least to 1933 when the repeal of Prohibition was accomplished through the ratification of the Twenty-First Amendment to the United States Constitution.[10] In 1984, this Court reaffirmed that the states could not constitutionally use the Twenty-First Amendment to shield economic protectionist measures designed to favor local alcohol commerce over interstate alcohol commerce, measures such as discrimination in taxation between local and out-of-

[10] The Twenty-First Amendment reserved to each state certain powers with respect to the regulation of intoxicating liquors. U.S. Const. amend. XXI. By 1964, however, this Court had made it abundantly clear that the Twenty-First Amendment did not constitute a *pro tanto* repeal of the Commerce Clause. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32, 84 S. Ct. 1293, 1297-98 (1964).

state alcohol products. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984) ("*Bacchus*").[11]

In 1984 when *Bacchus* was decided, Georgia had in place a tax scheme that was practically identical to the Hawaii scheme struck down in *Bacchus*.[12] Following this Court's *Bacchus* decision, however, the Georgia General Assembly transparently sought to retain the essential purpose and effect of its alcohol taxation system, yet insulate the Georgia scheme from this Court's Commerce Clause jurisprudence. First, on March 31, 1985, the General Assembly passed a new version of the alcohol tax that imposed one, singular rate of taxation on alcoholic beverages produced in and out of the State (the "Equalized Tax"). 1985 Ga. L. 662. On the very next day, however, the General Assembly repealed the Equalized Tax (which never became effective) and replaced it with a statute (the 1985 Alcohol Tax Statute) that, with only slightly different semantics, imposed the old, discriminatory rate favoring local producers by levying a 100% higher tax on the products of their out-of-state competitors. 1985 Ga. L. 665; O.C.G.A. § 3-4-60 (current version).

The General Assembly enacted the 1985 Alcohol Tax Statute despite clear advice from counsel for Respondents

[11] In *Bacchus*, this Court struck down a Hawaii statute that taxed out-of-state alcohol products at a higher rate than locally manufactured alcohol products on the basis that the tax constituted impermissible, "simple economic protectionism" in violation of the Commerce Clause. 104 S. Ct. at 3058.

[12] Since the repeal of Prohibition, Georgia had taxed out-of-state alcohol beverages at twice the rate of locally produced alcohol beverage products. *See* Ga. L. 1937-38, Ex. Sess., p. 103, §§ 11, 12; O.C.G.A. § 3-4-60 (pre-1985 version, Beam's Cert. Pet. App. EE.)

that it would be unconstitutional.[13] Perhaps because of this advice, and belying any belief in the constitutionality of the 1985 Alcohol Tax Statute, the General Assembly provided that, should the discriminatory tax (the 1985 Alcohol Tax Statute) ever be held to be unconstitutional, the Equalized Tax would automatically spring into existence. 1985 Ga. L. 665, § 4.

B. Taxpayers Were Not Able to Obtain Injunctive Relief Because the Respondents Singled Out the Refund Statute as the Appropriate Remedy.

Shortly after the 1985 Alcohol Tax Statute was enacted, but ***without the benefit of the evidence*** quoted in note 13, Heublein, Inc., another out-of-state alcohol company similarly situated to Beam, filed a complaint in the Superior Court of Fulton County, Georgia, seeking declaratory and injunctive relief to challenge the constitutionality of the 1985 Alcohol Tax Statute. *See* Beam's Cert. Pet. App. P; R. (*Beam* (Ga. II), No. S93A1217) at 977. In response to Heublein's motion for preliminary injunction (*id.* at 986), Respondents argued that the motion should be denied because, among other things, "The result of an

[13] "This [1985 Alcohol Tax Statute] is the language our office is on (public) record of saying is invalid under *Bacchus*. Thus, we may hear our opinion quoted back to us in litigation over this bill. Strong move afoot to try this approach out in the courts though and see if the local tax break can be saved." R. (*Beam* (Ga. I), No. 46642) at 201, Ex. A-3 (quoting David A. Runnion, Counsel of Record in this Court for Respondents in *Beam*). Further from Mr. Runnion: "Here, where the *real desire even in the new legislation* is to favor local alcohol industries, I do not feel it would be a winning argument [that the legislation was supported by a legitimate purpose]." *Id.* at 215, Ex. A-7 at 2 (emphasis supplied). Further: "In light of the way in which the U.S. Supreme Court is headed at the moment, it is my opinion that the only way to completely assure no revenue loss to the State in this area is to amend the foregoing two statutes to impose equal tax rates . . . . " *Id.*

injunction would quite simply be ***regulatory chaos.***" *Id.* at 1006, p. 18 (emphasis supplied). *See also id.* at 1002, p. 14. Additionally, the Respondents successfully argued that Heublein's motion for injunctive relief should be denied because Heublein had an adequate remedy at law in the ***Refund Statute.*** *Id.* at 1003, p. 15; *id.* at 1038-39, pp. 25-26 ("IT IS ABSOLUTELY CLEAR THAT [HEUBLEIN] HAS ADEQUATE REMEDIES AT LAW FOR SEEKING A REFUND") (quoting counsel for Respondents). In reliance upon the Refund Statute, the trial court in *Heublein* agreed that Heublein had not established any threat of irreparable harm and denied Heublein's motion for interlocutory relief. *See* Beam's Cert. Pet. App. P.[14] The *Heublein* case and the *Waldron* case (cited in preceding footnote) show that, when confronted with a taxpayer's pre-payment challenge to a tax scheme, Respondents told the taxpayer and convinced the Georgia courts that the taxpayer was not entitled to injunctive or declaratory relief, that an injunction against the challenged tax would so disrupt the administration of tax collection in Georgia that "regulatory chaos" and a plethora of other evils would result, and that the appropriate remedy for the taxpayer was the Refund Statute.

[14] Subsequently, the court upheld the constitutionality of the 1985 Alcohol Tax Statute and the Georgia Supreme Court concluded that it could not reverse. *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190, 196, *appeal dismissed for lack of properly presented federal question*, 483 U.S. 1013 (1987) (*"Heublein"*). *See also Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74, 75 n.1 (1989) (*"Waldron"*) (Refund Statute provides adequate remedy for taxes collected pursuant to an unconstitutional tax statute so as to preclude equitable relief).

C. Respondents and the Georgia Courts Affirmatively Represented the Refund Statute as the Appropriate Remedy for the Collection of Unconstitutional Taxes.

During the same 1937-38 legislative session in which the original version of the alcohol tax was enacted following the repeal of Prohibition, the General Assembly also enacted the Refund Statute. 1937-38 Ga. L., Ex. Sess., p. 77, § 34 (later codified as O.C.G.A. § 48-2-35). The Refund Statute provided as follows:

> (a) A taxpayer shall be ***refunded any and all taxes*** or fees which are determined to have been erroneously or ***illegally assessed and collected*** from him under the laws of this state, ***whether paid voluntarily or involuntarily***, and shall be refunded interest. . . .

O.C.G.A. § 48-2-35(a) (emphasis supplied). In proposing this legislation, the Governor of Georgia stated to the General Assembly,

> I am attaching a file * * * showing certain taxes that have been paid into the State treasury under ***laws that have since been declared unconstitutional***. There is no provision without an act of the legislature, to pay these taxes to these debtors of the State who have paid these unconstitutional taxes. This is a moral obligation of the State. I hereby recommend legislative action to provide for the repayment of these amounts. House Journal 1937, volume 1, pp. 505-567.

Wright v. Forrester, 192 Ga. 864, 16 S.E.2d 873, 874 (1941) (*"Forrester"*) (emphasis supplied). Thus, for many years, the Georgia Supreme Court recognized that the Refund Statute was enacted to provide redress for the collection of taxes later declared to be unconstitutional. *Id.; see also*

Waldron, 385 S.E.2d at 75 n.1.[15] In these many ways, Reich and Beam were affirmatively told that they need not evidence their objection to the legality of the taxes by, for instance, attempting to initiate some unspecified sort of anticipatory proceeding. In short, Georgia law gave no hint that a taxpayer should choose some remedy other than the Refund Statute.[16] All legislative, judicial, and

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[15] The Refund Statute offered some advantages for everyone involved. The Refund Statute required that the taxpayer first file an administrative refund claim, giving Respondents a full year to exercise their discretion to resolve the dispute without litigation. *See* O.C.G.A. § 48-2-35(b)(4). Then, if the dispute were not resolved at the administrative stage, Respondents waived their sovereign immunity bar to a lawsuit and consented to a refund action against them in the Georgia courts. *Id.* If successful, the taxpayer was promised a full refund of all illegally collected taxes with interest at the rate of 9% per year from the time the taxes were collected. O.C.G.A. § 48-2-35(a). Thus, in exchange for regulatory order, efficiency, the chance to avoid litigation in state and Federal court, and continued tax collection on the front end, Respondents promised taxpayers a full refund with interest on the back end. Additionally, the Refund Statute with its "whether paid voluntarily or involuntarily" language abolished the voluntary payment doctrine as a defense available to Respondents in tax cases – a defense, by the way, that Respondents now argue retroactively against Beam. *See* Respondents' *Beam* Cert. Op. Brief *passim* (repeated, irrelevant references that Beam paid the tax voluntarily); *see also Hawes v. Smith*, 120 Ga. App. 158, 169 S.E.2d 823, 824 (1969) (holding voluntary payment defense is not available where there is a tax refund statute).

[16] In point of fact, from 1985, when Beam filed its administrative claims for refund under Georgia's Refund Statute, until this Court's 1991 decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S. Ct. 2439 (1991) (*"Beam* (U.S.)"), *appeal after remand*, 263 Ga. 609, 437 S.E.2d 782 (Dec. 2, 1993) (*"Beam* (Ga. II)", *cert. petition pending*, U.S. S. Ct. Case No. 93-1140, everyone involved in the *Beam* case – including Beam, the Respondents and their counsel, and the Georgia courts – agreed that the Refund Statute was the appropriate remedy available to Beam if and only if Beam established that the taxes collected from it violated the Commerce Clause. Until then, neither the Respondents nor the Georgia courts ever suggested that Beam either had no standing to seek a refund, had not followed the proper procedure for obtaining a refund, or that the Refund Statute did not apply to unconstitutionally collected taxes. *See, e.g.*, 1988 Fulton Superior Court

official statements and conduct on the part of the State of Georgia affirmatively directed Georgia taxpayers to utilize the Refund Statute.

D. Reich and Beam Followed the Advice and Direction of the Respondents and the Georgia Courts and Used the Refund Statute Only to Have the Respondents and the Georgia Supreme Court Later Say When it Was Too Late to Follow Any Other Course that the Refund Statute Did Not Apply to Reich and Beam After All.

In April 1985, Beam filed its administrative claim for refund with the Georgia Department of Revenue seeking a refund of taxes paid during the prior three-year period, *i.e.*, roughly 1982 through 1984. R. (*Beam* (Ga. I), No. 46642) at 19-20, Ex. A. Beam filed its administrative claim for refund under and in accordance with all the procedural and limitation-period requirements of the Refund Statute. *Id.* Respondents certainly did not object to Beam's proceeding under the Refund Statute during the

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Order (Beam's Cert. Pet. App. F); *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95, 97 (1989) ("*Beam* (Ga. I)") (holding that if the tax statute were unconstitutional at the time the taxes were paid, then "Georgia [would face] liability for . . . ***refunds***. . . . *Georgia would have to* ***refund*** large sums of money that it has already spent" (subsequent history omitted, emphasis supplied); Transcript in the United States Supreme Court in *James B. Beam Distilling Co. v. Georgia*, No. 89-680 (U.S.) at 24-34 ("*Beam* (U.S.) Transcript") (Respondents admitting in judicio that the Refund Statute provided Beam the proper remedy and that no pre-payment protest was required). Georgia case law, *see, e.g., Waldron*, 385 S.E.2d at 75 & n.1; *State of Georgia v. Private Truck Counsel of Am., Inc.*, 258 Ga. 531, 371 S.E.2d 378, 380 (1988); *Ingalls Iron Works Co. v. Blackmon*, 133 Ga. App. 164, 210 S.E.2d 377, 378 (1977); *Barber v. Collins*, 201 Ga. App. 104, 410 S.E.2d 444, 445 (1991); *Marconi Avionics, Inc. v. DeKalb County*, 165 Ga. App. 628, 302 S.E.2d 384, 385-86 (1983); and *Hawes v. Smith*, 120 Ga. App. 158, 169 S.E.2d 823, 824 (1969), likewise completely confirmed the choice of the Refund Statute as the clear and certain remedy to challenge a tax statute.

two years Beam's refund claim was pending at the administrative level. When the Respondents had taken no action on Beam's administrative refund claim for the two years it had been pending, Respondents waived their sovereign immunity and Beam filed an action under the Refund Statute in the Fulton County Superior Court. *Id.* at 12. Again, if Respondents believed the Refund Statute did not apply to Beam's claim, they were silent, did not move to dismiss on that basis, and allowed the case to proceed through many years and levels of litigation. In *Beam*, the trial court found that the action was properly before it under the Refund Statute, *id.* at 244-46, ¶¶ 11-19 (Beam's Cert. Pet. App. F), but refused to grant Beam a refund by applying its holding of unconstitutionality prospectively only, *id.* at 250-52.[17]

Subsequently, however, this Court reversed the Georgia courts' prospective-only application of the constitutional decision in Beam's favor and held that the Pre-1985

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[17] In Beam's case, unlike the earlier *Heublein* case, the documents quoted above at note 13 and others generated in the course of the enactment of the 1985 Alcohol Tax Statute were produced in discovery by Respondents. These documents, which related to the purpose and effect of the ***1985 Alcohol Tax Statute***, contained sufficient proof to convince the trial court on summary judgment that even the ***Pre-1985 Alcohol Tax Statute*** had been violative of the Commerce Clause. *Id.* at 248, ¶ 5. In other words, the Georgia courts, faced with evidence that the statute ***then in existence*** had been enacted under a cloud of invidious, discriminatory, protectionist intent, used that evidence to hold the ***prior*** statute unconstitutional – ***but*** not so as to afford Beam any relief in the form of a refund or otherwise. By applying their holdings prospectively only, the Georgia courts could then deny Beam any refund for the years in which the taxes at issue had been paid. And further, because the Pre-1985 Alcohol Tax Statute had already been repealed by enactment of the Equalized Tax and then, immediately thereafter, the cosmetically altered 1985 Alcohol Tax Statute, the prospective-only holding that the Pre-1985 Alcohol Tax Statute was unconstitutional was meaningless in effect. The Georgia Supreme Court affirmed on all grounds. *Beam* (Ga. I), 382 S.E.2d at 95.

Alcohol Tax Statute was unconstitutional during the years in question and at the time for which Beam was seeking a refund. *Beam* (U.S.), 111 S. Ct. at 2439. In *Beam* (U.S.), this Court determined that the *Bacchus* holding must be applied retroactively to the taxes paid by Beam during the years in question (roughly 1982 through 1984). *Id.* at 2441.

Not to be outdone, however, the Respondents and the Georgia courts adopted a course of action to deprive the Federal Retirees and Beam of their constitutional rights.[18] The link between *Reich* and *Beam* was permanently welded when the Georgia Supreme Court, in its first *Reich* decision, stepped into the *Beam* case while *Beam* was still before the trial court on cross-motions for summary judgment. In *Reich* (Ga. I), the Georgia court, in an unprecedented holding that overruled prior case law and with a thinly veiled reference to *Beam*, held for the first time ever 1) that Georgia's Refund Statute "***does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional*** or otherwise invalid[,]" 422 S.E.2d at 849 (emphasis supplied), and 2) that in order to recover payment of an unconstitutional tax, a taxpayer must earlier have first a) filed a protest and b) demanded a refund before or at the time the tax is paid. The Georgia court cited no statutory or other authority for either proposition, and its decision was in direct, unexplained, and irreconcilable conflict with *Forrester*, 16 S.E.2d at 873, and with *Waldron*, 385 S.E.2d at 74. The

[18] Upon remand from this Court, Respondents amended their Answer in *Beam*, raising for the first time numerous new, alleged procedural defenses, including claims that the Refund Statute was inapplicable, that Beam lacked standing to seek a refund, and that Beam should have availed itself of a plethora of alleged predeprivation remedies.

Reich (Ga. I) court, with unmistakable but flawed reference to *Beam*, grounded its decision upon the proposition that its holding "protects the State against those instances in which a vendor/taxpayer has recouped its tax expense by passing it on to the consumer. Were we to interpret the [Refund S]tatute differently, the vendor/taxpayer would realize a windfall or double recovery not intended by the legislature." 422 S.E.2d at 849 (citations omitted).[19]

On December 2, 1993, the Georgia Supreme Court issued its latest decisions in *Beam* and *Reich*. In *Reich* (Ga. II), the court held that Reich was not entitled to any relief under the Due Process Clause of the Fourteenth Amendment because he had failed to pursue certain so-called "predeprivation" remedies. The court cited its *Beam* (Ga. II) decision of the same day for this ho[illegible]g. 437 S.E.2d at 321. Thus, although the underlying tax systems at issue in *Reich* and *Beam* are different, the response by the Respondents and the Georgia courts to this Court's constitutional holdings in the respective cases has been identical and even more egregious than Florida's conduct reversed by this Court in *McKesson*: Eliminate the only remedy available to the taxpayer, the remedy the taxpayer had been directed to use, and the remedy the taxpayer actually used.

E. Federal Due Process Prohibits the Tactic Used by Respondents and the Georgia Supreme Court against Reich and Beam.

The shell game played by the Respondents and the Georgia courts violates the clearly enunciated due

[19] This argument concerning windfall, double recovery, or pass-on/standing was the very same argument made by Florida but rejected by this Court in *McKesson* as inconsistent with Commerce Clause and due process principles. *See* 110 S. Ct. at 2255-56.

process decisions of this Court. *See, e.g., Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451 (1930) ("*Brinkerhoff*"). Therefore, even if there were now some shred of adequacy to be found in the predeprivation remedies now posited by the Respondents and the Georgia courts – and there is none – in light of the facts in these cases, Respondents' repeated affirmative representations of the Refund Statute as an appropriate remedy and Reich's and Beam's reliance thereupon to their detriment (while the time for pursuing any other course expired) estops Respondents from now denying the promised refunds and pretermits the issue of the alleged adequacy of predeprivation remedies.[20]

The situation in *Brinkerhoff* was closely analogous to the situation that now exists in Georgia after *Reich* and *Beam*. The plaintiff taxpayer in *Brinkerhoff* brought an equity action against a Missouri county for discriminatory taxation. The defendants answered that equitable

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[20] The first public hint that the Respondents might tamper with the refund remedy came during the oral argument before this Court in *Beam* in 1991 when Respondents stated:

> I think that Georgia, along with many States, are investigating the possibility of changing their statutes to give them greater protection, whether it be limiting the statute of limitations for a refund, or adopting a protest requirement. But in light of the change in this Court's doing away with prospectivity, I think there is a great possibility the State would feel compelled to change its refund statute.

Beam (U.S.) Transcript at 33. No doubt this Court did not understand by these remarks that Respondents intended to adopt all these changes retroactively against Beam and the Federal Retirees so as to attempt to deprive Beam and the Federal Retirees of any remedy at all. Likewise, this Court's recognition in 1991 in *Beam* (U.S.) that Respondents would be able to raise procedural defenses at the remedial level after remand from this Court was most certainly not an invitation to Respondents and the Georgia courts to invent new procedural bars that did not exist at the time the taxpayers paid their taxes, to scrap long-standing Georgia remedial law retroactively, and then apply newly-created rules to preclude any relief on pending claims.

relief was not available because the plaintiff had not pursued its administrative remedy. The Missouri Supreme Court agreed with the defendants that the plaintiff had an adequate remedy at law in the administrative remedy, was guilty of laches in failing to pursue that administrative remedy on a timely basis, and was therefore not entitled to equitable relief. The painfully obvious problem with this holding was that Missouri law had always provided up until the time of this holding that the administrative commission (wherewith the purported administrative remedy lay) did not have the power to grant relief from the kind of discrimination alleged by plaintiff Brinkerhoff. "The possibility of the relief before the tax commission was not suggested by anyone in the entire litigation until the [Missouri] Supreme Court filed its opinion . . . . Then it was too late for the Plaintiff to avail itself of the newly found remedy." *Id.* at 453. This Court reversed the Missouri Supreme Court because that court had denied the plaintiff due process. *Id.* at 453.[21]

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[21] "The violation is nonetheless clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute." *Id.* at 454. Thus, the very act by the Georgia Supreme Court of construing the Refund Statute to deny relief in contradiction to its prior holdings deprived Reich and Beam of due process. In other words, state courts may not deny relief by "putting forward nonfederal grounds of decision that were without any fair or substantial support" in preexisting state law." *Ward*, 40 S. Ct. at 421 (1920); *see also Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810, 814 (1947) (holding states cannot refuse to enforce rights because they arise from Federal law or discriminate against Federal law claims in favor of claims based on state law); *see also* Beam's Cert. Pet. Apps. UU and VV and part entitled "Current Events in Georgia Related to Taxpayer Relief" (describing Respondents' decision to grant refunds of casual sales tax illegal under *Georgia* law but not to grant refunds to Beam and Federal Retirees, taxpayers of Georgia taxes illegal under *Federal* law). *Beam* and *Reich* are squarely within the holdings of *Brinkerhoff*, *Ward*, and *Testa*.

F. Consistent with Federal Due Process, Respondents Must Refund to Reich and Beam the Unconstitutionally Collected Taxes.

Echoing its holding in *Reich* (Ga. II) at issue here, the Georgia Supreme Court held in *Beam* (Ga. II):

> federal due process, as interpreted by the Supreme Court in [*McKesson* and *Harper*], does not require that the State of Georgia refund to appellant the discriminatory portion of the excise taxes . . . .

437 S.E.2d at 782. The Georgia court based this holding upon the supposed availability of certain, so-called predeprivation remedies for satisfaction of the Respondents' constitutional duty to accord taxpayers due process. *Id.* at 785-87. In the absence of any postdeprivation remedy for unconstitutionally collected taxes, only the existence of a clear and certain, duress-free, predeprivation remedy will satisfy due process. *See, e.g. McKesson*, 110 S. Ct. 2250-52.

1. Due Process Requires the Remedy 1) to Have Been Clear and Certain, 2) to Have Been a Predeprivation or Prospective Remedy, and 3) to Have Been a Constitutionally Adequate (Duress-Free) Remedy.

Most recently in *Harper*, 113 S. Ct. at 2510, this Court completely reaffirmed its due process jurisprudence formulated in such cases as *Atchison*[22] and *McKesson*[23]:

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[22] *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 32 S. Ct. 216 (1912) (emphasis supplied). As early as 1912, Justice Holmes, writing for a unanimous Court, held that, in preservation of one's "liberty," one "who denies the legality of a tax *should have a clear and certain remedy.*" 223 U.S. at 285-86. If a remedy, taking all circumstances together, works an "implied duress" to require payment of the tax, that remedy is inconsistent with the requirement of a clear and certain remedy. 32 S. Ct. at 217. Under the

> A State that "establish[es] various sanctions and summary remedies designed" to prompt taxpayers to "tender . . . payments *before their obligations are* entertained or *resolved*" does not provide taxpayers "a meaningful opportunity to withhold payment and to obtain a *predeprivation determination* of the tax assessment's validity." Such limitations impose constitutionally significant " 'duress' " because a tax payment rendered under these circumstances must be treated as an effort "to avoid financial sanctions or a seizure of real or personal property." ***The State accordingly may not confine a taxpayer under duress to prospective relief.***

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circumstances of that case, the *Atchison* Court identified some three forms of duress: 1) the risk of having to "forfeit [the taxpayer's] right to do business" as one of the costs bound up with exercising a remedy, 2) the risk of having to "pay a penalty" as one of the costs associated with employing a remedy, and 3) "the risk of having [the taxpayer's] contracts disputed and its business injured" as one of the consequences associated with employing a remedy. *Id.* Other obvious forms of duress (subsequently recognized in *McKesson*) would be the risk of criminal prosecution for nonpayment and the risk of having one's goods seized and/or destroyed for nonpayment as costs associated with employing a remedy.

[23] In *McKesson*, this Court unanimously reaffirmed the requirement of " 'a clear and certain remedy.' " 110 S. Ct. at 2248 (citation omitted). The *McKesson* Court went on to specify two broad ways in which a state may meet its obligation to provide a clear and certain remedy for deprivation of tax monies. *First*, a state may provide a clear and certain remedy by which a taxpayer may have its "objections [to the legality of the tax] *entertained and resolved*" *"before"* the taxpayer must tender tax payments. *Id.* Further, in order to suffice as a clear and certain remedy, such a predeprivation remedy *must be free of and must also be concluded prior to any duress imposed upon the taxpayer to pay the tax*. Further, in discussing the insufficiency (as against the requirement of a clear and certain remedy) of a predeprivation or prospective remedy that imposes duress to pay the tax, the Court reaffirmed and added to the *Atchison* forms of duress. *Second*, a state may meet its obligation to provide a clear and certain remedy by providing a postdeprivation or retrospective remedy so long as that remedy provides *"meaningful backward-looking relief to rectify any unconstitutional deprivation," id.* at 2247 (footnote omitted, emphasis supplied): for instance, relief in the form of a refund.

Harper, 113 S. Ct at 2519-20 & n.10 (citation omitted, alteration original, emphasis in part supplied). Thus, when exacting taxes, a state, in order to satisfy its due process obligations, has available two broad remedial choices: It must provide at least one clear and certain, duress-free predeprivation remedy or one fully adequate postdeprivation remedy. Simply put, Georgia provides neither. In *Reich* (Ga. I), the Georgia Supreme Court retracted the only postdeprivation remedy available to any taxpayer who has paid a tax pursuant to an unconstitutional statute – the Refund Statute. Each predeprivation remedy now posited by the Georgia Supreme Court for Reich and Beam is constitutionally inadequate.[24]

2. The Administrative Remedies Cited by the Georgia Supreme Court Are Not Duress-Free And Do Not Allow a Constitutional Challenge.

For this Court's purposes in *Reich*, the predeprivation remedies upon which Respondents relied in *Beam* will serve to illustrate why retrospective relief is now the only remedial avenue open to Georgia under Federal due process. None of the statutory procedures relied upon by the Georgia court in *Beam* (Ga. II) did anything to eliminate the continuing duress designed to coerce Beam into continuing to purchase tax stamps in order to pay the tax

[24] Two members of the Georgia Supreme Court agreed, did not join in all of *Beam* (Ga. II), 437 S.E.2d at 787, and dissented in *Reich* (Ga. II), 437 S.E.2d at 322-25 ("nothing under the specific provisions of the state tax code can be said to have provided [Reich] with the opportunity for a constitutionally meaningful predeprivation challenge"; equitable or declaratory relief "does not clearly protect the taxpayer against [Respondents'] employment of its various sanctions and summary remedies which are otherwise designed to encourage timely payment of taxes *prior* to resolution of the dispute").

imposed under the Pre-1985 Alcohol Tax Statute.[25] Without risking 1) criminal prosecution, 2) the seizure and/or destruction of its property as unstamped contraband, and 3) the suspension and/or cancellation of its license, Beam could not have done business in Georgia or shipped its products into Georgia without *first* having affixed stamps to its products *before* they entered Georgia.[26] Further, 4)

[25] *See* O.C.G.A. §§ 48-2-54 (assessment notice) (Beam's Cert. Pet. App. PP); 50-13-12 (administrative hearing procedure) (App. SS); 3-2-11 (administrative review) (App. U).

[26] *See, e.g.*, Georgia Revenue Rule § 560-2-3-.09 (***"No person shall move or cause to be moved into Georgia** or receive, hold, purchase, give away, sell, or offer to sell in Georgia any distilled spirits . . . unless each individual container of such distilled spirits shall have affixed thereto at all times a tax stamp showing full payment of all the taxes thereon. Tax stamps shall be purchased and affixed to containers **prior to shipment**"* (emphasis supplied)). This Rule is Respondents' own, crystal-clear, published interpretation of O.C.G.A. § 3-4-61(a)(2), a statute which Respondents now attempt to use as the source of authority for their contention that a manufacturer's wholesalers, rather than the manufacturer, were legally responsible for purchasing and affixing tax stamps. *See, e.g.*, Respondents' *Beam* Cert. Op. Brief at 6 & n.7. When read in the light of Respondents' many regulations and representations, however, it is clear that the "every manufacturer *or* wholesaler" language in O.C.G.A. § 3-4-61(a)(2), now relied on by Respondents, as a practical matter means "every manufacturer and, if for some reason not the manufacturer, then the wholesaler." Since it is the manufacturers who *first* import the product into Georgia (and thereby *first* incur the duty to purchase and affix stamps), it is only on the rare occasion of some oversight that the wholesaler ever purchased and affixed stamps. *See, e.g.*, R. (*Beam* (Ga. II), No. S93A1217) at 583-85, ¶¶ 5-8. Much less was the legal burden to purchase and affix stamps ever shifted from the manufacturers to the wholesalers. And Respondents have themselves earlier admitted in judicio these facts that are contrary to their recently developed positions: "[M]anufacturers must buy tax stamps as indicia of payment of taxes, and those stamps must be affixed to the bottles *prior* to their importation into the state. O.C.G.A. § 3-4-61." *Id.* at 1006, p. 18 (quoting counsel for Respondents, emphasis supplied). "THOSE TAX STAMPS HAVE TO BE PLACED ON THE CONTAINERS BEFORE THE ALCOHOL REACHES THE BORDERS OF THE STATE OF GEORGIA." *Id.* at 1027, p. 14 (quoting counsel for Respondents). Respondents' transparent attempt to portray the stamp system as something other than what it was in order to buttress their pass-on/standing argument is

other licensees (wholesalers, retailers) in the Georgia system of alcohol beverage distribution and even consumers would have been subject to the risk of criminal prosecution or license suspension/cancellation for dealing in unstamped product.[27] And that unstamped product, as contraband, would have been subject to seizure and/or destruction in the hands of such licensees and consumers as well. These adverse consequences for other licensees and for consumers would have dissuaded such persons from doing business with Beam.

Finally, **5)** Beam would have been subject to the risk of severe civil penalties by not paying the tax.[28] Even if

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exposed by another fact as well: Beam's prior offer to recover on behalf of its wholesalers (whom Respondents repeatedly assert are the real parties in interest) was completely ignored by Respondents. *See* R. (*Beam* (Ga. II), No. S93A1218) at 72-78.

27 *See* O.C.G.A. §§ 3-1-4 (violation a misdemeanor) (Beam's Cert. Pet. App. S); 3-2-3 (Rev. Dept. may deny, suspend or cancel license to do business) (App. T); 3-2-33 (unstamped liquor is contraband, which must be destroyed immediately) (App. W); 3-2-34 (same) (App. X); 3-2-36 ("shall secure warrants or other criminal process . . . shall prosecute") (App. Y); 3-3-1 (privilege to deal in alcoholic beverages in Georgia) (App. Z); 3-3-3 (license requirement) (App. AA); 3-3-9 (violation of these provisions is a misdemeanor) (App. BB); 3-3-27 (felony and misdemeanor) (App. CC); 3-3-29 ("no person knowingly and intentionally shall possess, sell, or purchase any distilled spirits not bearing proper tax stamps") (App. DD).

28 If a taxpayer fails to pay a tax, the Revenue Department issues an Official Notice of Assessment and Demand for Payment, whereby a "Demand is hereby made for immediate payment of the amount shown above" and a further warning is made as follows:

> A state tax execution is being issued in the amount of this assessment unless immediate payment in full is received at the office indicated herein, the [writ of] fi[eri] fa[cias] will be recorded and levied upon any property you own. If necessary, other procedures authorized by law, including attachment and garnishment, will be resorted to in order to enforce payment. You may judicially contest, upon certain conditions, any such levy upon your property, and if you pay the assessment as required or if it is collected you may seek a refund, again upon certain conditions.

Beam had chosen to violate Georgia's tax stamp laws, awaited receipt of an assessment notice, and filed an appeal from the notice pursuant to O.C.G.A. § 48-2-59 (Beam's Cert. Pet. App. RR) (cited by the *Beam* (Ga. II) court below as a clear and certain predeprivation remedy), yet further obligations would have been imposed. *See* O.C.G.A. § 48-2-59(c) (security bond for tax *plus* interest *plus* costs). Further, whenever the Revenue Department issues an assessment (regardless of any appeal), the law imposes yet other penalties and interest charges. *See* O.C.G.A. §§ 3-2-11 (Beam's Cert. Pet. App. U), 48-2-44 (App. OO), 48-2-40 (App. NN).[29]

Furthermore, the procedure described in O.C.G.A. § 50-13-12 by its very terms, did not apply to a claim challenging the constitutionality of a Georgia statute.[30] The same is true of the administrative assessment and appeal provisions related specifically to the collection of

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29 The Georgia court's suggestion that, because of the *discretionary* waiver provision set forth in O.C.G.A. § 3-2-12 (Beam's Cert. Pet. App. V), Beam should have shipped unstamped, bootleg spirits into Georgia and awaited an assessment notice without legitimate concern over adverse consequences rings hollow. The *McKesson* Court described the types of sanctions and summary remedies it had in mind; *see* 110 S. Ct. at 2251 n.20: "warrant . . . to levy upon and sell," "penalty," "interest," and "revo[cation of] license." The forms of duress brought to bear upon Beam to make sure that Beam paid its taxes prior to shipping its product into Georgia are precisely the types of duress deemed impermissible in *Atchison* and *specifically recognized* in *McKesson* ("sanctions and summary remedies designed so that liquor distributors tender tax payments *before* their objections are entertained and resolved," *id.* at 2251 (emphasis original)), and, further, regarded as mandating clear and certain *retrospective* relief.

30 This procedure contemplates a challenge to either **a)** an "act *of the* ***Department*** in a matter involving . . . liabilities for taxes," **b)** a "failure *of the* ***Department*** to act in such a matter," or **c)** an "order *of the* ***Department*** in such a matter." O.C.G.A. § 50-13-12(a) (emphasis supplied).

taxes in O.C.G.A. §§ 48-2-54, *et seq.* Nowhere is the Revenue Commissioner given the authority to declare unconstitutional an act of the legislature.[31]

3. A Suit for Declaratory/Injunctive Relief was not a Clear and Certain, Duress-Free Remedy Available to Reich or Beam.

The Georgia court erred in holding that Georgia's clear and certain remedy lay, not in the Refund Statute, but in a general suit for declaratory relief under O.C.G.A. §§ 9-4-1, *et seq.* (Beam's Cert. Pet. App. GG, HH and II), coupled with a motion for emergency injunctive relief under O.C.G.A. § 9-11-65 (App. KK). ***Indeed, a Georgia defendant may handily defeat a suit in equity or a declaratory judgment action by merely pointing out the availability of an alternative statutory procedure.***[32] The

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[31] The general principle of law that a mere agency cannot review the acts and statutes passed by the General Assembly quite plainly confirms the only clear and certain meaning and scope of these administrative procedures. *See, e.g., George v. Department of Natural Resources*, 250 Ga. 491, 299 S.E.2d 556, 557 (1983) (no agency jurisdiction under the Georgia APA to entertain challenge to constitutionality of statute); *Flint River Mills v. Henry*, 234 Ga. 385, 216 S.E.2d 895, 896 (1975); *Ledford v. Dep't of Transp.*, 253 Ga. 717, 324 S.E.2d 470, 471 (1985) (same).

[32] *See, e.g., Rybert & Co. v. City of Atlanta*, 258 Ga. 347, 368 S.E.2d 739, 742 (1988); *Georgia Pub. Serv. Comm'n v. Southern Bell*, 254 Ga. 244, 327 S.E.2d 726, 728 (1985); *Schieffelin & Co. v. Strickland*, 253 Ga. 385, 320 S.E.2d 358, 360-61 (1984); *Newsome v. Brown*, 252 Ga. 421, 314 S.E.2d 225, 226 (1984); *Benton v. Gwinnett County Bd. of Educ.*, 168 Ga. App. 533, 309 S.E.2d 680, 682 (1983); *George*, 250 Ga. 491, 299 S.E.2d at 557-58 ("courts should not render declaratory judgments where other *statutory remedies* have been specifically provided." (emphasis supplied)); *Brogdon v. State Bd. of Veterinary Medicine*, 244 Ga. 780, 262 S.E.2d 56, 57-58 (1979); *Guice v. Pope*, 229 Ga. 136, 189 S.E.2d 424, 426 (1972); *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4, 7 (1972); *Shippen v. Folsom*, 200 Ga. 58, 35 S.E.2d 915, 916-17 (1945); *Forrester*, 16 S.E.2d at 875; *see also Cantrell v. Henry County*, 250 Ga. 822, 301 S.E.2d 870, 872 (1983). Thus, even though the Georgia declaratory judgment statute states

possibility of a suit in equity for declaratory/injunctive relief, moreover, does nothing to eliminate the duress upon the taxpayer throughout the pendency of the suit (and appeals thereafter) to continue paying the tax. This precise point was recognized by Justice Holmes when he wrote for this Court that, even if the taxpayer "should seek an injunction . . . , he would run the same risk as if he waited to be sued." *Atchison*, 32 S. Ct. at 217. The only hope for actual prospective relief under this scenario would be to obtain interim injunctive relief while the declaratory proceeding goes forward. Under Georgia law, however, the grant or denial of interlocutory equitable relief lies within the discretion of the trial court.[33] This discretion excludes declaratory/injunctive relief from the

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that the availability of another remedy will not preclude declaratory relief, *see* O.C.G.A. § 9-4-2(c), the Georgia Supreme Court has authoritatively ruled that, this language notwithstanding, "courts should not render declaratory judgments where other *statutory remedies* have been specifically provided." *George*, 299 S.E.2d at 558 (emphasis supplied); *see also Rybert*, 368 S.E.2d at 742.

Respondents often attempt to avoid this long line of authority by citing Georgia cases that involved injunctive or declaratory relief in general but that are silent on the specific issue of the preclusion of injunctive/declaratory relief by a specific statutory remedy. Obviously, the preclusion issue will not arise, for instance, if there is no applicable statutory procedure or if the issue is not raised as a defense or on appeal.

[33] *See* O.C.G.A. § 9-5-8 (Beam's Cert. Pet. App. JJ) (providing the power to grant any injunction "shall be prudently and cautiously exercised and, except in clear and urgent cases should not be resorted to"); *Beck v. Glaze*, 230 Ga. 593, 198 S.E.2d 283, 284 (1973); *Davies v. Curry*, 230 Ga. 190, 196 S.E.2d 382, 384 (1973); *Apostolic Overcoming Holy Church of God v. Davis*, 228 Ga. 36, 183 S.E.2d 745, 747 (1971); *Carpenters Local Union No. 3024 v. United Broth. of Carpenters and Joiners of America*, 220 Ga. 596, 140 S.E.2d 876, 878 (1965); *see also* O.C.G.A. § 48-7-84 (providing that "[n]o action for the purpose of restraining the assessment or collection of any [income tax] shall be maintained in any court").

"clear and certain" category. *See Reich* (Ga. II), 237 S.E.2d at 325 (Carley, J., dissenting).

Further, the availability to Respondents of a sovereign immunity defense to any action *not* under the Refund Statute likewise renders any such remedy unclear and uncertain. As a general rule, Respondents are immune from declaratory judgment actions.[34] The exception to this general rule is a statutory waiver of sovereign immunity, as in the Refund Statute.[35] The same is true with respect to all equitable relief in general.[36]

Finally, the Georgia court's decisions in *Reich* (Ga. II) and *Beam* (Ga. II) ignore the historical fact that equitable relief to enjoin the tax stamp obligation *was in fact sought and squarely denied*. As in the *Heublein* case discussed above at Part II.B. and as in several cases discussed by Reich, Respondents have successfully argued in Georgia

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[34] *See C.W. Mathews Co. v. Dep't of Trans.*, 160 Ga. App. 265, 286 S.E.2d 756, 757 (1981); *Health Facility Investments, Inc. v. Georgia Dep't of Human Resources*, 238 Ga. 383, 233 S.E.2d 351, 353 (1977). *See generally* Ga. Const. Art. 1, § 2, ¶ 9 (1990).

[35] *See Self v. City of Atlanta*, 259 Ga. 78, 377 S.E.2d 674, 676 (1989); *Georgia State Board of Dental Examiners v. Daniels*, 137 Ga. App. 706, 224 S.E.2d 820, 821 (1976); *Salter* (Petitioner's Appendix A in *Reich*).

[36] In *Henderson*, 195 S.E.2d at 7, for example, the Georgia Supreme Court denied equitable relief in the form of mandamus, holding that it was only pursuant to the Refund Statute and not pursuant to equitable jurisdiction that Respondents had waived their sovereign immunity, thus precluding other types of action: "The State has waived her sovereign immunity only to the extent provided by the express terms of this statute." *Id.* at 6. In *Musgrove v. Georgia R.R. & Banking Co.*, 204 Ga. 139, 49 S.E.2d 26 (1948), *appeal dismissed*, 335 U.S. 900 (1949), the Georgia courts dismissed a taxpayer case seeking equitable relief on the basis that the state had not waived sovereign immunity. Further, to the extent any equity action might remain viable, it would be an action against state officials in their *individual* capacities, which would expose the taxpayer to the risk that the state officials would not be able to satisfy an order. That, too, shows that Reich and Beam had no clear and certain predeprivation remedy.

courts that regulatory and administrative "chaos," assertedly contrary to the public interest, would result if taxpayers were not first required to pay the tax and then utilize the statutory cause of action provided in the Refund Statute. Put in stark and simple terms, if a taxpayer with Federal constitutional claims sued in equity to enjoin the tax, the taxpayer was unceremoniously poured out of court and told bluntly by both Respondents and the Georgia courts to bring a proceeding under the Refund Statute. If, on the other hand, the taxpayer follows the clear and certain legislative, judicial, and official directive, as Reich and Beam have done, the taxpayer is told, ***long after the fact and long after it is too late to do anything about it***, that the taxpayer should, alas, have brought a suit in equity to enjoin the tax and that the taxpayer has no remedy now. Under these circumstances, therefore, Respondents should be estopped from even arguing the availability of predeprivation remedies on this *post hoc* basis. *See Brinkerhoff*, 50 S. Ct. at 451.

CONCLUSION

For all the foregoing reasons Beam respectfully requests that this Court reverse the Georgia Supreme Court's decision in *Reich* (Ga. II), render judgment to Charles J. Reich for the amount of the taxes unconstitutionally collected from him by Respondents, plus interest at the rate of at least 9% per year since the taxes were collected. Further, Beam respectfully requests that this Court grant its pending petition for writ of certiorari, reverse the Georgia Supreme Court's decision in *Beam*, and render judgment to Beam in the amount of

$2,252,096.75, with interest at the rate of at least 9% per year since the taxes were collected.[37]

Respectfully submitted,

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[37] The Respondents have stipulated that Beam paid a total of $2,252,096.75 in taxes under the unconstitutional Pre-1985 Alcohol Tax Statute during the three-year period corresponding to the three-year limitations period for Beam's claim under the Refund Statute (April 25, 1982 through December 31, 1984). R. (*Beam* Ga. II), S93A1217) at 18; *see* O.C.G.A. § 48-2-35(b)(1). Because the Pre-1985 Alcohol Tax Statute taxed out-of-state producers at twice the rate of in-state producers, the total discriminatory portion of Beam's tax payments was $1,126,048.37. Although the Refund Statute does not apply to Beam in light of *Reich*, Beam respectfully submits that its three-year limitations period and interest rate of 9% are the most analogous and appropriate state law provisions under the circumstances. But for the discrimination against Georgia taxpayers with Federal claims, these provisions would have applied.